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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-904

GREAT FIDELITY INVESTMENT COMPANY, HAROLD HICKERSON, JAMES R. GARNER, DAVID LEE BAKER, ROBERT J. BUFORD, LEE R. BAKER, ROBERT O. HALL, LEON N. GILBERT, ERNEST C. HALL and W. PAUL KASPAREK,
Petitioners,

VERSUS

M. F. MARTIN and CURTIS H. YOUNG,
Respondents.

PETITION FOR REHEARING

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March, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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Comes now the Petitioners above named in this cause and show to this Honorable Court that heretofore a Petition for Writ of Certiorari was filed and was by this Court denied on the 28th day of February, 1972.

Your Petitioners show to this Court that they believe and therefore allege that they are entitled to a rehearing and a reconsideration of this cause by reason of the following facts:

1. No opinion was written by the United States Court of Appeals, Fifth Circuit. The case was disposed of on appeal merely by using the words, "Affirmed, see Local Rule 21." This is a departure from the accepted and usual course of jurisdiction proceedings and is in violation of the requirements of Rule 19, Paragraph (b), page 17, Rules of the Supreme Court of the United States, Adopted June 15, 1970.

2. The Petitioners specifically ask the Court to consider the fact that because in the Pre-Trial proceedings before the United States District Court, it was not set out that the respondents were not and could not be the owners of the note sued on that this question could not be raised in the trial court and likewise in the United States Court of Appeals, Fifth Circuit. The question was raised apparently for the first time on Motion for a New Trial in the United States District Court which Court held that it came too late and the Circuit Court in affirming likewise so held.

In *Zenith-Radio Corporation* v. *Hazeltine Research, Inc.*, United States Supreme Court, October Term, 1970, No. 80, dated February 24, 1971 on Writ of Certiorari to the United States Court of Appeals, Seventh Circuit, this Court used this language:

> "Zenith was never unambiguously called upon to submit a formal plea; to hold under such circumstances that want of a submission amounts to a waiver would be to treat pleadings as 'a game of skill in which one misstep by counsel may be decisive to the outcome.'"

Mr. Roy Hudspeth of Fort Worth, Texas, conducted the Pre-Trial on behalf of the Petitioners and apparently inadvertently failed to raise the question that the respondents were not the owners of the notes and collateral upon which the suit was based but, in defense of Mr. Hudspeth, it is presumed that he did not know that M. F. Martin and Curtis H. Young had violated the contract of sale and had fraudulently secured the possession of the notes and collateral sued on herein which were required to be escrowed under the written contract with the Fort Worth National Bank of Fort Worth, Texas.

Martin and Young had no authority to receive the notes and collateral sued on and the case should have been dismissed by reason thereof.

To permit judgment to stand is to permit Martin and Young to take advantage of their own fraud and violation of the written contract.

One misstep by an attorney should not be decisive of the outcome of an important lawsuit.

Next we call to the attention of the Court that the Trial Judge and the Court of Appeals, Fifth Circuit, did not have a right to disregard the provisions of the written contract providing for credits on the notes sued on account of undisclosed liabilities not appearing on the Balance Sheet.

Volume 17; C.J.S.; page 942, Art. 457, is as follows, in part:

> "The parties to a contract may ordinarily, by express provisions therein alter the general rules of law by indicating what the effect of a breach of the particular contract shall be, and where this is done it has been stated that the courts are precluded from giving any other effect to such breach."

See also, *Pearce* v. *Shurtz, et al.*, 270 P.2d 442 (Utah), and also *Foxley* v. *Rich*, 35 Utah 162, 99 P.2d 666, 672.

CONCLUSION

Your Petitioners feel that they have been denied their rights under the Constitution and laws of the United States in that they have not been afforded the reason to know why the United States Court of Appeals affirmed the judgment of the trial court.

They feel that they have been denied their statutory and legal rights in denying to them their rights under the Contract and that they have further been denied their rights by permitting Martin and Young to sue on notes and collateral which they fraudulently and wrongfully procured and was denied this relief on a technicality by reason of the failure of counsel to raise such question at the Pre-Trial Conference, although he may not have known of such facts at the time.

Your Petitioners hope that they have not unduly burdened this Court with the case, but they feel that precedent of grave importance will be fixed or approved by this Court if this cause is not reversed. While we deeply appreciate the Circuit Judges or any other judges making every effort to keep abreast of the litigation filed, we feel that the first thing for consideration in any court is not how much time we can save, but how just we can be.

We, therefore, most respectfully ask this Court to grant a rehearing and grant Certiorari and determine this case upon the law and the facts.

Respectfully submitted,

JOHN B. OGDEN
Suite 1415
City National Bank Tower
Oklahoma City, Oklahoma 73102
Counsel for Petitioners

March, 1972

CERTIFICATE OF GOOD FAITH

I, the undersigned counsel, hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay, but in order that substantial justice may be done.

Counsel also certifies that the Petition for Rehearing herein is presented for the further reason that the grounds of this Petition for Rehearing were not, in the opinion of counsel, fully and clearly presented and some of the authorities presented in this Petition for Rehearing were not presented in the original Petition for Writ of Certiorari.

JOHN B. OGDEN
Counsel for Petitioners

CERTIFICATE OF MAILING

I hereby certify that I have served three (3) copies of the foregoing Petition for Rehearing by mailing, first class postage, fully paid, to:

Mr. Olcott Phillips
of the Firm of McDonald, Sanders,
Ginsburg, Phillips, Maddox & Newkirk
Attorneys at Law
2900 Continental National Bank Bldg.
Fort Worth, Texas 76102,

Counsel for Respondents, this ..... day of March, 1972.

JOHN B. OGDEN
Counsel for Petitioners.